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# California Underground Facilities Safe Excavation Board

August 20-21, 2018

## Agenda Item No. 4 (Information Item) – Staff Report

### *Area of Continual Excavation*

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#### ***Presenter***

Tony Marino, Executive Officer

Deborah Yang, Legal Counsel

#### ***Summary***

For agricultural purposes, Government Code section 4216.4(a) may be subject to different interpretations. Staff sees Pacific Gas and Electric Co.'s ("PG&E") interpretation that farmers would be required to pothole whenever using machinery above a transmission line as a possible reasonable interpretation of the law, but not the only possible reasonable interpretation. Staff agrees that the law could benefit from clarification to allow more flexibility in the method and the timing of determining the exact location of a subsurface installation for the purposes of agriculture. Finally, staff suggest that, when considering civil liability implications of the statute, farmers seek advice from their legal counsel.

#### ***Background***

During the July 24, 2018 workshop meeting in Bakersfield on area of continual excavation, representatives from PG&E proposed an interpretation of the Dig Safe Act of 2016 that had significant ramifications for California's agricultural operations. The representatives suggested that the requirement of Government Code § 4216.4 that a farmer would need to "determine the exact location of the subsurface installations in conflict with the excavation *using hand tools*" (emphasis added) meant that, to follow the law, a farmer would need to hand expose a subsurface installation whenever operating farming equipment in the tolerance zone. A determination of "exact location" made using pipeline in-line inspection devices, LIDAR, or ground-penetrating radar would not fulfill the statutory requirement as none of these are considered a "hand tool" pursuant to the definition in Government Code § 4216(i). As transmission lines are generally three or more feet below ground, such a requirement could entail multiple days of hand-exposing deeply-buried lines multiple times a year, exposing workers to heat, fatigue, and trenching-related hazards for a safety benefit that is at best debatable.

During the meeting, the Board requested that staff report back to the Board at the next meeting and provide staff's opinion of this interpretation.

#### ***Discussion***

PG&E's interpretation that statute requires the hand-exposure of a subsurface installation for any ticket in which agricultural machinery operates above the installation is reasonable, but it is not the only reasonable interpretation. In particular, the phrase "in conflict" in Government Code § 4216.4 is not defined in statute, nor does it exist in the Common Ground Alliance Best Practices. One could interpret, consistent with PG&E's interpretation, that the condition of "in conflict" encompasses the situation where

the tolerance zone and excavation work overlap on the surface of the ground. Government Code § 4216.18 (b), on the other hand, appears to envision a situation where this would not be the case. In this section, the Legislature has required the Board to develop a standard for reasonable care in which the Board considers “additional excavating depth an excavator should make” if the “subsurface installation is delineated within the tolerance zone but is not in conflict with the excavation.” In another agenda item for this two-day workshop meeting, the Board is considering questions that staff proposes the California Regional Common Ground Alliance discuss in conducting stakeholder meetings, including the possible interpretations of the phrase “in conflict” and the consequences of those interpretations.

When considering the meaning of “in conflict” for agricultural purposes, one also must consider a practical question aired at the July 24 Bakersfield meeting, of whether a line, potholed by a grower at four to five feet in 2017, is “in conflict” with an 18-inch disking operation in 2018.

Because of the recurring, surface-level nature of agricultural work on heavily-managed land, and because of the ambiguity of excavation as it applies to such work under Government Code section 4216.4(a), legislative clarification of the means by which and frequency for which the “exact location” of a subsurface installation must be determined for agriculture would be beneficial. Staff emphasizes how this clarification should only apply to the special case of area of continual excavation tickets—the primary users of which would be agriculture. Staff suggests that one possible way to accomplish this change would be to amend Government Code § 4216.10, which already allows the Board to determine alternative approaches to delineation (§ 4216.2) and location and marking (§ 4216.3) for area of continual excavation, to also allow the Board to determine the means by which and frequency for which the exact location of a subsurface installation can be determined. Staff had believed this to be a fundamental aspect of the legislative charge around area of continual excavation before learning of PG&E’s interpretation, and a legislative change of this nature would provide the Board clear direction to do so.

Staff does not have guidance for what the agricultural community should do in advance of such a legislative change, given the ambiguity of the requirement. The Board can take no enforcement action against farmers for violation of the one-call law until July 1, 2020, six months after the Board is to adopt regulations, but the larger legal concern is likely civil litigation in the event of an accident. The Board is not the attorney for any farming operation, and staff doesn’t want to give any impression to the contrary. By the same token, a subsurface installation operator does not represent agriculture’s legal interests and should not presume to give farmers legal advice. If farmer and subsurface installation operator agree that an instance of an agricultural activity does not pose a safety threat, but that activity might constitute a violation of law on the part of the farmer, it is the farmer’s—not the subsurface installation operator’s—choice as to whether to proceed with that activity.

*Attachment(s): Government Code §§ 4216.4, 4216.10, 4216.18*

**Attachment: Government Code Sections 4216.4, 4216.10, and 4216.18**

**4216.4.**

- (a) (1) Except as provided in paragraph (2), if an excavation is within the tolerance zone of a subsurface installation, the excavator shall determine the exact location of the subsurface installations in conflict with the excavation using hand tools before using any power-driven excavation or boring equipment within the tolerance zone of the subsurface installations. In all cases the excavator shall use reasonable care to prevent damaging subsurface installations.
- (2) (A) An excavator may use a vacuum excavation device to expose subsurface installations within the tolerance zone if the operator has marked the subsurface installation, the excavator has contacted any operator whose subsurface installations may be in conflict with the excavation, and the operator has agreed to the use of a vacuum excavation device. An excavator shall inform the regional notification center of his or her intent to use a vacuum excavation device when obtaining a ticket.
- (B) An excavator may use power-operated or boring equipment for the removal of any existing pavement only if there is no known subsurface installation contained in the pavement.
- (3) An excavator shall presume all subsurface installations to be active, and shall use the same care around subsurface installations that may be inactive as the excavator would use around active subsurface installations.
- (b) If the exact location of the subsurface installation cannot be determined by hand excavating in accordance with subdivision (a), the excavator shall request the operator to provide additional information to the excavator, to the extent that information is available to the operator, to enable the excavator to determine the exact location of the installation. If the excavator has questions about the markings that an operator has placed, the excavator may contact the notification center to send a request to have the operator contact the excavator directly. The regional notification center shall provide the excavator with the contact telephone number of the subsurface installation operator.
- (c) (1) An excavator discovering or causing damage to a subsurface installation, including all breaks, leaks, nicks, dents, gouges, grooves, or other damage to subsurface installation lines, conduits, coatings, or cathodic protection, shall immediately notify the subsurface installation operator. The excavator may contact the regional notification center to obtain the contact information of the subsurface installation operator. If the operator is unknown and the damage or discovery of damage occurs outside the working hours of the regional notification center, the excavator may follow the instructions provided by the regional notification center through its Internet Web site or the telephone line recorded message.
- (2) An excavator shall call 911 emergency services upon discovering or causing damage to either of the following:

(A) A natural gas or hazardous liquid pipeline subsurface installation in which the damage results in the escape of any flammable, toxic, or corrosive gas or liquid.

(B) A high priority subsurface installation of any kind.

(d) Each excavator, operator, or locator shall communicate with each other and respect the appropriate safety requirements and ongoing activities of the other parties, if known, at an excavation site.

*(Amended by Stats. 2016, Ch. 809, Sec. 6. (SB 661) Effective January 1, 2017.)*

**4216.10.**

(a) In lieu of the notification and locate and field mark requirements of Sections 4216.2 and 4216.3, an excavator may contact a regional notification center to request a continual excavation ticket for an area of continual excavation. The regional notification center shall provide a ticket to the person who contacts the center pursuant to this section and shall notify any member, if known, who has a subsurface installation in the area of continual excavation. The ticket provided to the excavator shall include the contact information for notified operators.

(b) An operator shall provide a response to the excavator pursuant to subdivision (a) of Section 4216.3.

(c) (1) When the area of continual excavation includes, or is within 10 feet of, a high priority subsurface installation, the operator of the high priority subsurface installation shall notify the excavator of the existence of the high priority subsurface installation to set up an onsite meeting prior to the legal excavation start date and time or at a mutually agreed upon time to determine actions or activities required to verify the location and to prevent damage to the high priority subsurface installation during the continual excavation time period. The onsite meeting shall be used to develop a mutually agreed upon plan for excavation activities that may be conducted within 25 feet of each side of the subsurface installation. Additional onsite meetings should also be held following unexpected occurrences or prior to excavation activities that may create conflicts with subsurface installations. As part of the meeting, the excavator shall discuss with the operator the method and tools that will be used during the excavation and the information the operator will provide to assist in verifying the location of the subsurface installation. The excavator shall not begin excavating until after the completion of the onsite meeting and information has been provided describing the activities that can be safely conducted to prevent damage to the high priority subsurface installation.

(2) When the area of continual excavation includes a subsurface installation but does not include, or is not within 10 feet of, a high priority subsurface installation, the excavator or the operator may request an onsite meeting at a mutually agreed upon time to determine actions or activities required to verify the location and to prevent damage to the subsurface installation during the continual excavation time period. The onsite meeting

may be used to develop a plan for excavation activities that may be conducted within five feet of each side of the subsurface installation. The operator and excavator may mutually agree to conduct additional onsite meetings following unexpected occurrences or prior to excavation activities that may create conflicts with subsurface installations. As part of the meeting, the excavator may discuss with the operator the method and tools that will be used during the excavation and the information the operator will provide to assist in verifying the location of the subsurface installation. If an onsite meeting is requested prior to the legal excavation start date and time, the excavator shall not begin excavating until after the completion of the onsite meeting and information has been provided describing the activities that can be safely conducted to prevent damage to the subsurface installation.

(3) The excavator and operator shall maintain records regarding the plan of excavation, any locate and field mark and standby activities, and any other information deemed necessary by the excavator and operator. Excavation activities outside the scope of the plan shall be undertaken subsequent to notification pursuant to Section 4216.2.

(d) A ticket for an area of continual excavation shall be valid for one year from the date of issuance. The excavator may renew the ticket within two working days either by accessing the regional notification center's Internet Web site or by calling "811."

(e) The board shall, in consultation with the regional notification centers, develop through regulation a process by which the renewal requirement for a continual excavation ticket may be modified or eliminated for areas of continual excavation in which no subsurface installations are present.

(f) This section shall become operative on July 1, 2020.

*(Amended by Stats. 2017, Ch. 26, Sec. 50. (SB 92) Effective June 27, 2017. Section initially operative July 1, 2020, by its own provisions.)*

**4216.18.** The board shall develop a standard or set of standards relevant to safety practices in excavating around subsurface installations and procedures and guidance in encouraging those practices. When possible, standards should be informed by publicly available data, including, but not limited to, that collected by state and federal agencies and by the regional notification centers pursuant to subdivision (g) of Section 4216.6, and the board should refrain from using data about facility events not provided either to a state or federal agency or as statewide information, as defined in paragraph (2) of subdivision (h) of Section 4216.6. The standard or set of standards are not intended to replace other relevant standards, including the Best Practices of the Common Ground Alliance, but are to inform areas currently without established standards. The standard or set of standards shall address all of the following:

(a) Evidence necessary for excavators and operators to demonstrate compliance with Sections 4216.2, 4216.3, 4216.4, and 4216.10.

(b) What constitutes reasonable care, as required by paragraph (1) of subdivision (a) of Section 4216.4, in using hand tools around subsurface installations within the tolerance zone, considering the need to balance worker safety in trenches with the protection of subsurface installations. As part of determining reasonable care, the board shall consider the appropriate additional excavating depth an excavator should make if either of the following occur:

- (1) The subsurface installation is delineated within the tolerance zone but it is not in conflict with the excavation.
- (2) The location of a subsurface installation is determined, but additional subsurface installations may exist immediately below the located subsurface installation.

(c) What constitutes reasonable care, as required by paragraph (1) of subdivision (a) of Section 4216.4, in grading activities on road shoulders and dirt roads which may include standards for potholing.

*(Amended by Stats. 2017, Ch. 26, Sec. 54. (SB 92) Effective June 27, 2017.)*